United States General Accounting Office

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Report to the Honorable Larry E. Craig, U.S. Senate

December 1999

DEPARTMENT OF EDUCATION

Compliance With the Federal Advisory Committee Act and Lobbying Restrictions

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United States General Accounting Office
Washington, D.C. 20548

General Government Division

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December 30, 1999

The Honorable Larry E. Craig
United States Senate

Dear Senator Craig:

This report responds to your request that we examine regular weekly "Thursday" meetings held by the Department of Education (Education) with representatives of lobbying and other organizations interested in federal education issues. Education began holding the Thursday meetings in 1995, at a time of much congressional debate on legislative proposals regarding the future existence and funding of the department and the federal role in education. Because the issues discussed at these meetings included pending legislation and administration policies, and the participants included lobbyists and others associated with education organizations, you asked that we examine (1) whether the meetings were subject to the provisions of the Federal Advisory Committee Act (FACA) and (2) whether Education violated appropriations restrictions on lobbying.

You also asked us to examine whether FACA applies to two series of meetings on urban education issues that Education held in 1996 and 1997 with outside groups. In addition, at your request, we examined several meetings, which occurred in fiscal years 1995 and 1996, to determine whether statutory provisions, which prohibit the use of appropriated funds for lobbying purposes, had been violated.

Results in Brief

The evidence we reviewed does not support a conclusion that the various series of meetings we considered were "advisory committee" meetings within the scope of FACA or that Education officials violated the applicable antilobbying restrictions.

The determination whether a particular group is subject to FACA depends on whether it is an advisory committee. Under FACA, an advisory committee is any committee or similar group that is established or utilized by the President or a federal agency in the interest of obtaining advice or recommendations. Under recent case law, one factor in determining the existence of an advisory committee is the formality and structure of the group. However, the critical question is whether the group was established

to obtain advice or recommendations for the agency on an identified policy or issue.

In the fall of 1995, Education began hosting meetings every Thursday with representatives of organizations interested in education. According to Education, 60 to 70 people attended each meeting, with the attendees varying from week to week. Based on the evidence we reviewed, it does not appear that Education began or continued to hold the Thursday meetings for the purpose of obtaining advice or recommendations on any departmental policy. Rather, those meetings appeared to be informal gatherings held to share information with outside groups.

In 1996 and 1997, Education cosponsored a series of 5 meetings with approximately 66 participants, including urban school administrators, school board members, teachers, parents, community representatives, state policymakers, and university educators. Our review showed that these meetings did not have the characteristics of a FACA advisory committee. The meetings were loosely structured through a facilitator, and no participant attended more than one meeting. The meetings resembled focus groups, in that suggestions and opinions were offered by individual participants. Although some suggestions involved possible action by the federal government, they appeared to be generated at the participants' initiative rather than in response to a request for specific advice on an identified governmental issue or policy.

In July 1997, Education initiated a series of four meetings with representatives of some of the organizations that had participated in the earlier series of five meetings. Although these meetings involved the same group of participants over the course of the meetings, we did not find that they had been convened to obtain advice or recommendations on any specific issue or proposal for Education.

During the periods in question, Education was subject to a criminal provision, which prohibits the use of appropriated funds for certain lobbying purposes, as well as several antilobbying appropriations provisions. Both the criminal provision and the antilobbying appropriations provisions apply to grass roots lobbying by agencies, which generally is understood to mean an appeal to members of the public to contact legislators to influence pending legislation. The Department of Justice, which has responsibility for enforcement of the criminal provision, interprets it to apply only to large-scale, high-expenditure grass roots lobbying campaigns and does not apply it to public speeches, appearances, and writings. The antilobbying appropriations provisions have not been

interpreted as containing these limitations on the definition of grass roots lobbying. These provisions do allow agencies to expend appropriated funds to communicate their views on pending legislation with the public or meet with outside groups to exchange information and viewpoints. Because we did not find evidence to support a conclusion that Education violated the more broadly interpreted antilobbying appropriations provisions, there is no basis for referring this matter to the Department of Justice as a possible criminal violation.

We reviewed several statements alleged to have been made by Education officials to determine whether there were violations of the appropriations restrictions on lobbying. In the Thursday meetings, one of the attendees alleged that Education officials were not simply providing information to the attendees but were also encouraging them to lobby Congress. He provided examples of such statements extracted from notes he took at the meetings. Most of these alleged statements were general requests for help or support in connection with legislative proposals and did not contain the express request for participants to contact Congress, which is required to support a determination that the appropriation restrictions on lobbying were violated. Two of the alleged statements appeared to have contained such language, and Education agreed such statements would have been problematic, if made. However, Education officials said the statements were not made and our interviews with other attendees at those meetings did not corroborate that the statements were made.

We also examined a series of meetings between Education officials and private groups concerning Education's budget to determine if the officials encouraged meeting participants to contact Congress or if Education was improperly directing, participating, or providing support for a grass roots lobbying effort. Based on the evidence we reviewed relating to these meetings, we cannot conclude that Education officials were improperly encouraging participants to contact Congress or that Education was providing improper assistance to private lobbying groups.

Background

Education has an extensive outreach program with education organizations that it states is designed to further its information-sharing role authorized by Congress in the Department of Education Organization Act (DEOA). (See 20 U.S.C. 3402(4).) Education points out that its Presidentially appointed officers are specifically directed by the statute to perform a public information function, which is to include providing useful information about education and related opportunities to students, parents, and communities.

As part of its outreach efforts, Education began hosting regular Thursday meetings in 1995, at a time of much congressional debate on legislative proposals regarding the future existence and funding of the department and the federal role in education. Education officials told us that approximately 60 to 70 people attended each meeting, some of whom were lobbyists. They also said that the intent of the meetings was to share information with representatives or organizations interested in educational issues and to garner support for the administration's education policies. The nature of and participants in these and other meetings Education held with various outside parties raised important issues as to (1) whether Education held these meetings for the purpose of obtaining advice or recommendations for Education, thus implicating FACA and (2) whether Education was improperly enlisting the assistance of the participants to advocate its initiatives to Congress in violation of the appropriations restrictions on lobbying.

Scope and Methodology

To determine whether Education's regular Thursday meetings held with representatives of lobbying and other organizations interested in federal education issues were subject to the provisions of FACA and/or violated antilobbying provisions of appropriations law, we interviewed Education officials and obtained and examined documents related to the meetings. We interviewed and examined notes taken at the Thursday meetings by an attendee who expressed concern that such meetings were violating FACA and antilobbying restrictions. In addition, we reviewed approximately 100 hard copy files of a high-level Education official who was an organizer of the Thursday meetings. We also attended three Thursday meetings.

We also reviewed about 750 electronic-mail messages between that official and certain other Education officials, lobbying groups, and education organizations that were sent during the period from June 5 through July 31, 1997. We selected this period with the concurrence of your office because it included Thursday meetings at which one attendee became concerned that certain statements made by Education officials had FACA and/or antilobbying implications. We selected, also in consultation with your office, the Education officials, lobbying groups, and education organizations for the electronic-mail search based on our judgment that they were the principle individuals or entities whose communications might have been related to the FACA and antilobbying concerns. Education's electronic-mail contractor retrieved all messages from the period selected between the Education official who was an organizer of the meetings and other selected parties. The retrieved messages came from those that had been saved on a backup tape for purposes of disaster recovery of electronic-mail accounts. According to the contractor, he

provided the messages in the official's account at the time the monthly backup tape was made. Therefore, any message that was deleted before the monthly backup would have been lost.

Many of the files we reviewed referred to a variety of outreach meetings other than the Thursday meetings held between Education officials and representatives of education interest groups. Together with your office, we identified for further review three meetings (individual or series of meetings) where the information in the files appeared to raise issues of whether Education was complying with FACA and/or the appropriations restrictions on lobbying. During this review, we identified another series of meetings that had possible FACA implications. We reviewed files for this series of meetings as well. We obtained and reviewed Education correspondence associated with these meetings, meeting minutes and reports as available, and other documentation.

We interviewed 14 officials from education interest groups who participated in either the Thursday or other meetings that we reviewed. The purpose of these interviews was to obtain the participants' perspectives of the circumstances and purposes of the meetings and/or their recollections regarding statements that may have been made during the meetings by Education officials.

To determine whether any of the meetings met the criteria for an advisory committee, we reviewed the Federal Advisory Committee Act (5 U.S.C. App. 2). We also reviewed several antilobbying provisions – a criminal statute found at 18 U.S.C. 1913 and enforced by the Department of Justice, and appropriation provisions found at section 631 of the 1997 Treasury, Postal Service, and General Government Appropriations Act, in section 503(a) of the 1996 and 1997 Departments of Labor, Health and Human Services, and Education**,** and Related Agencies Appropriations Act and section 504(a) of the 1995 Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act. We reviewed case law and discussed FACA implications with an official of the U.S. General Services Administration's Committee Management Secretariat, which has oversight responsibility for FACA.

We did our work in Washington, D.C., from September 1997 through August 1999 in accordance with generally accepted government auditing standards. We obtained written comments on a draft of this report from Education. These comments are discussed at the end of this letter and are reprinted in appendix I.

Applicability of FACA to Meetings With Outside Groups

On several occasions, Education held meetings with various outside groups to discuss education issues. Because Education convened these meetings, and the meetings were organized and attended by Education personnel, we reviewed records of these meetings to determine whether they were subject to the requirements of FACA.

FACA establishes requirements pertaining to the creation, operation, duration, and review of covered advisory committees. For example, the act requires advisory committees to file charters, publish notice of their meetings, open their meetings to the public, and make their minutes and other committee records publicly available. Whether a particular group is subject to FACA's requirements depends on whether it meets FACA's definition of an advisory committee. As explained below, FACA defines an advisory committee as a committee or similar group that is established by the President or a federal agency "in the interest of obtaining advice or recommendations" for the President or an agency.

We reviewed three separate series of meetings convened by Education to determine whether any involved an advisory committee subject to FACA. The meetings we reviewed were as follows:

1. Education's weekly meetings with representatives of organizations interested in education, known as the "Thursday meetings;"

2. a series of five meetings Education cosponsored with other groups to discuss issues relating to urban education; and

3. a series of four "follow-up" meetings Education held with representatives of organizations involved in the earlier series of five meetings.

While each of the three series of meetings was convened by Education, and included individuals from outside groups who attended the meetings at the invitation of Education, the evidence we reviewed does not support the conclusion that any of the groups were formed for the purpose of obtaining advice or recommendations for Education. Therefore, FACA would not apply. The applicable legal framework, and our analysis of each of the three series of Education meetings, follows.

Applicable Legal Framework

As noted above, the determination of whether a particular group is subject to FACA depends on whether it is an advisory committee. Under the act, an advisory committee is defined as including "any committee . . . or similar group" that is established or utilized by the President or a federal

agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." (See section 3(2) of FACA.)

Because FACA's definition of an advisory committee is broadly worded, courts have articulated the criteria to be applied in determining whether ad hoc groups not formally constituted as advisory committees are subject to FACA. In an early case interpreting FACA, (Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975)), the issue was whether the White House had convened an advisory committee by holding biweekly meetings with private sector representatives to exchange views and "increase the flow of information" between the private sector participants and top executive branch officials. Following each meeting, a memorandum of what transpired was prepared. The private sector participants also provided their views and recommendations on a variety of subjects, which were included in the written summaries.

The court, in Nader v. Baroody, held that the White House meetings did not involve advisory committees since they were "unstructured, informal, and not conducted for the purpose of obtaining advice on specific subjects indicated in advance." According to the court, in enacting FACA, Congress was concerned with "advisory committees formally organized which the President or an executive department or official directed to make recommendations on identified governmental policy for which specified advice was being sought." The court noted that the White House meetings lacked formal organization and continuity, and it found that there was no indication that the meetings involved a "presidential request for specific recommendations on a particular matter of governmental policy." Rather, according to the court, the informal White House meetings "merely wisely provided [the President] with a mechanism and sounding board to test the pulse of the country."

Under subsequent case law, a factor in determining the existence of an advisory committee is the formality and structure of the group.[1] However, the critical question is whether the group was established "in the interest of obtaining advice or recommendations" for the agency. In answering this

[1]See Association of American Physicians and Surgeons v. Clinton, 997 F.2d 898, 915 (D.C. Cir. 1993), stating that the wide range of groups and committees that exist, and the extent to which FACA applies, can best be viewed as a continuum: "At one end one can visualize a formal group of a limited number of private citizens who are brought together to give publicized advice as a group. That model would seem covered by the statute . . . At the other end of the continuum is an unstructured arrangement in which the government seeks advice from what is only a collection of individuals who do not significantly interact with each other. That model, we think, does not trigger FACA." See also Grigsby Brandford & Co. v. United States, 869 F. Supp. 984 (D.D.C. 1994).

question, as in Nader above, the courts have looked to whether the agency solicited advice from the group on an identified policy issue or problem facing the agency.[2] Where such advice has been solicited, the courts have held that FACA applies. For example, in Food Chemical News v. Davis, 378 F. Supp. 1048 (D.D.C. 1974), the court found that an agency had established advisory committees by informally meeting with groups of industry and consumer representatives, where the purpose of the meetings was to obtain the groups' comments and suggestions on the agency's draft of a proposed rule. Likewise, in National Nutritional Foods Association v. Califano, 603 F.2d 327 (2d Cir. 1979), the court found that the Federal Drug Administration (FDA) had formed an advisory committee by meeting with medical experts to discuss how FDA should regulate and warn the public about the dangers associated with protein supplements. In holding that this was an advisory committee, the court found it particularly significant that the agency "leaned so strongly on the advisory group" in a press release and, in fact, had incorporated the group's specific suggestions into a proposed rule requiring warning labels for protein supplements.

In contrast to these cases, the courts have held that FACA does not apply where an agency is meeting with an outside group that is seeking to advance the group's own proposals, even if the agency shares an interest in the results of the group's work. For example, in Consumers Union v. Department of Health, Education, and Welfare, 409 F. Supp. 473 (D.D.C. 1976), FDA held a series of meetings with an association representing the cosmetics industry to discuss the association's proposals for voluntary safety testing of cosmetic ingredients. In these meetings, FDA reacted to the proposals and also explored its role in the program, discussing how the proposed program would interface with FDA's regulatory process. While the meetings involved a formally structured group with a fixed membership, which met on a regular basis for a specific purpose, the court held that FACA did not apply:

> "The meetings complained of here were not ad hoc, amorphous, or casual group meetings as in Nader v. Baroody. [The meetings] were the culmination of many months of planning, consulting, and revising. On the other hand—and unlike Food Chemical News—the two meetings were not called to consider proposals dealing with impending agency action. They were essentially consultations

[2]See Grigsby Brandford & Co., cited in footnote 1. See also Judicial Watch v. Clinton, 76 F.3d 1232, 1233 (D.C. Cir. 1996) ("…the Act is limited to committees that provide advice on an identified governmental policy." "The term 'policy' implies choice; advice on an identified government policy is necessarily advice which favors one of alternative positions or courses of action").

concerning the group's own proposal. This is a crucial factor for determining the group's status under the Act." 409 F. Supp. at 476.[3]

Furthermore, the fact that an agency may use the results of a group's work does not, in itself, mean that the group was established or utilized as an advisory committee. For example, in Sofamor Danek Group v. Gaus (61F.3d 929 (D.C. Cir. 1995), the court held that an agency's "subsequent and optional" use of a committee's work product did not trigger FACA, where the committee had been established for a different purpose. While the court's decision in Califano, above, emphasized the FDA's reliance on advice from a group of medical experts in a press release and proposed rule, this was the end product of a meeting that FDA held for the purpose of seeking the medical experts' advice concerning the best course of action for FDA to take on a specific policy matter, a critical component in determining FACA's applicability.

Analysis of Education Meetings

As noted above, we examined three series of meetings that Education held with representatives of outside groups to discuss education issues. The following describes the facts relating to each series of meetings and our analysis of the applicability of FACA.

Thursday Meetings

In the fall of 1995, Education began hosting meetings every Thursday with representatives of organizations interested in education. According to Education, 60 to 70 people attended each meeting, but the attendees varied from week to week.[4] A departmental official told us that the meetings were open to the public and that notice of the meetings was passed on by word-of-mouth. Regular Education participants included the cochairpersons, the Acting Deputy Secretary and Senior Adviser to the Secretary, individuals from the Office of Congressional Affairs, and Education officials who wanted to know what was going on within Education.

Education told us that the purpose of the Thursday meetings was to share information on federal education developments and issues and to discuss topics of mutual interest and concern. According to a departmental official, the meetings began as a "response to a growing frustration within

[3]Similarly, in Center for Auto Safety v. Federal Highway Administration (FHA), (No. 89-1045, 1990 U.S. Dist. LEXIS 13733 (D.D.C. Oct. 12, 1990)) the court held that the fact that the FHA personnel participated in meetings with an association of state transportation agencies to revise highway design standards did not implicate FACA, even though FHA previously had incorporated the association's standards into its regulations governing federally funded highways. Stating that "intergroup membership alone" does not trigger the application of FACA, the court found that the meetings in question were designed to benefit the association of state agencies rather than FHA.

[4]Education maintained a roster for facilitating entry into the building of persons who frequently chose to attend the meetings.

Education concerning our ability to adequately and efficiently disseminate relevant information to our customers." The agendas prepared by Education for the meetings indicated that the topics discussed generally included pending legislative matters and administrative issues, policies, and initiatives, such as "America Goes Back to School."

Our review of Education's files on this matter, as well as electronic-mail messages relating to the Thursday meetings, did not show that Education had held the meetings to obtain advice or recommendations on any departmental issue or policy. Further, we interviewed seven of the outside participants in the meetings, who told us that they viewed the meetings as a vehicle for sharing information. Because the evidence we reviewed indicates that the meetings were informal gatherings held to share information with outside groups, we have no basis to conclude that these meetings were advisory committee meetings within the scope of FACA. See Nader v. Baroody, discussed above (meetings convened to exchange views and "increase the flow of information" do not involve advisory committees). See also GSA's regulations implementing FACA, at 41 C.F.R. 101-6.1004(l) (FACA does not apply to specified types of meetings, including "[a]ny meeting with a group initiated . . . for the purpose of exchanging facts or information").

Five Meetings on Urban Education

In 1996 and 1997, Education cosponsored a series of five meetings with the Council of the Great City Schools (CGCS) and the Institute for Educational Leadership (IEL). The letter inviting individuals to participate in the meetings stated that the goal was to improve urban education by (1) reviewing and reaching consensus on what urban schools and school systems need to do to improve and (2) designing a plan for what others outside urban education could do to help. The letter stated that the cosponsors would be "convening small, informal meetings . . . to solicit advice and support from a select group of public and private sector leaders concerned with education in urban schools." The letter also said that each invitee would attend one meeting and that the sessions would be limited to 10 to 12 individuals to encourage discussion.

The five meetings were held on December 9, 1996, January 13 and 27, 1997, and February 10 and 24, 1997, at the offices of the CGCS. Approximately 66 individuals participated during the 5 meetings, although no individual, other than employees of the cosponsoring organizations, attended more than 1 meeting. The participants included urban school administrators, school board members, teachers, parents, community representatives, state policymakers, university educators, and others.

At the meetings, participants were asked to discuss ideas for improving urban schools. The notes for each meeting stated that the goals were to identify (1) the priorities that urban schools and urban school districts should focus on to improve, (2) components of national (but not necessarily federal) strategies to improve urban education, and (3) the roles of various stakeholders in carrying out these strategies.

The notes and summaries of the meetings written by an Education contractor indicated that the meetings resembled focus groups. The meetings appeared to be "round table" discussions led by a facilitator who was a former Education employee, with only a small amount of active participation by Education officials or others associated with the cosponsoring organizations. Summaries of the individual meetings, and a consolidated summary of all five meetings, indicated that the groups generated a variety of suggestions directed to the local, state, and national levels. Suggestions for possible activities by the federal government included such things as "us[ing] the bully pulpit to focus national attention on urban education issues" and "provid[ing] seed money for demonstrations of systemic reform strategies in prototype urban districts."

Although the initial invitation letter sent to participants used language suggesting that the purpose of the meetings was to "solicit advice and support" from the participants, our review of the agendas, meeting notes and summaries, and other documentation showed that the meetings did not have the characteristics of a FACA advisory committee. As noted above, the meetings were loosely structured through a facilitator, and different participants attended each meeting. Essentially, the meetings resembled focus groups, with notes being made of the various suggestions that were offered by individual participants.[5] Although some of the groups' suggestions involved possible action by the federal government, they were generated at the groups' initiative, not in response to a request for specific advice on an identified issue or policy. See Nader v. Baroody, above. Furthermore, the fact that the groups' discussions were summarized and consolidated by Education and the other cosponsors does not provide a basis for inferring an advisory relationship between the groups and Education. See Nader v. Baroody (White House summarized biweekly

[5]The General Services Administration (GSA), the agency responsible for administering FACA, found these factors significant in advising us that it did not view the five meetings as involving a FACA advisory committee. According to GSA, the meetings did not involve the type and level of structure that would trigger FACA. In this regard, GSA regulations provide that FACA does not apply to any meeting initiated by a federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. See 41 C. F.R. 101-6.1004(i).

meetings with representatives of private sector groups, including views and recommendations offered by the representatives).

Four "Follow-up" Meetings on Urban Education

In July 1997, Education initiated a series of four meetings with representatives of some of the organizations that had participated in the earlier series of five meetings. Because these meetings involved the same group of participants, and may have satisfied some of the prerequisites for FACA coverage, we reviewed them to determine whether they had been convened "in the interest of obtaining advice or recommendations" for Education, the critical factor in determining whether FACA applies.

The four meetings had their genesis in a memorandum from the Assistant Secretary for the Office of Elementary and Secondary Education to the Secretary of Education. In this memorandum, the Assistant Secretary described the earlier series of five meetings and stated that "although momentum to improve urban schools has been building, it needs to be broadened and brought together around concerted actions." He stated that there were several organizations that had issued urban agendas, which contained very similar strategies for urban education reform, and suggested that the Secretary convene the leaders of these organizations to "discuss their common aims and formulate a workable plan of action." The Assistant Secretary further stated that "such a meeting would underscore this Administration's commitment to urban education at a time when the urban community is greatly disappointed about the failure to fund the School Construction bill in the budget agreement."

The Secretary agreed to the Assistant Secretary's suggestion for a meeting and sent invitational letters to the heads of the identified organizations. This meeting was held on July 24, 1997. According to the agenda and the Secretary's talking points, the main discussion topics were: "How we can work together to develop a national focus for urban schools?" and "How do we mobilize greater support and focus for urban education?" The notes of the meeting show that each organization's representative offered suggestions for the organizations and, in some instances, for Education. The suggestions for Education were very general in nature. For example, participants suggested that "[T]he Department needs a clear message that urban education is its focus . . .," and "ED needs to focus more on urban education, e.g., strategic plan lacks a mention of urban areas, ED only has one lab with a focus on urban areas."

The next meeting took place on October 1, 1997, and was cosponsored by Education, CGCS, and IEL.[6] According to the agenda, one of the desired outcomes was to determine a few priority areas of focus for an urban education initiative. One of the discussion topics listed in the agenda was "Discuss ideas for an urban initiative." Under this topic, the agenda explained that, "[m]any of your organizations have recently outlined urban education initiatives and priorities for improving urban schools," and it listed 11 themes as cutting across these initiatives. The participants were asked to come up with "the top 3-4 strategies that we can pursue to support urban schools in helping all students reach high standards."

Notes from the October 1 meeting state that "the purpose of the meeting was to look at various agendas of the urban organizations and to coalesce around discreet issues." The notes show that there was discussion of a possible White House competitive grant program and three themes that had been identified for the program. Following that discussion, eight themes were voted on to determine "the areas of priority." It is not clear from the notes whether the vote related to the grant program or whether it related to areas of priority for the groups to pursue. We were unable to determine the purpose of the vote from our interviews with meeting participants. According to Education, the Assistant Secretary attending the meeting recalled that the vote was taken to rank what the groups in attendance should focus on, and was not related to the prior discussion of a grant program.

The third meeting, which took place on November 13, 1997, involved presentations by two White House officials. According to the Assistant Secretary's letter notifying the outside participants about the meeting, the two White House officials had been invited to "accommodate your request." Although the agenda had included a topic for general discussion, "Are we targeting the right areas for an urban grant program," the notes of the meeting reveal that the meeting consisted of presentations by the White House officials on the subjects of "The White House Initiative on Urban Education," and the "President's Initiative on Race," with a question and answer session following each presentation.

The fourth and apparently final meeting took place on December 8, 1997. The Assistant Secretary's invitational letter stated that the purpose of the meeting was for group participants to "prepare a joint communiqué for the White House that will emphasize our support for including the urban

[6]According to Education, three of the four follow-up meetings were cosponsored by Education, CGCS, and IEL.

initiative in the FY '99 budget . . ." According to Education, its officials left this meeting when the communiqué was discussed, and the notes of the meeting show that only the outside participants were involved in developing the communiqué. The communiqué, which was signed by the outside participants and sent to the President, urged the President to initiate legislation dealing with various aspects of urban education, such as raising urban school standards and repairing and renovating school buildings.

As previously discussed, the key question under FACA is whether a group was established by an agency in the interest of obtaining advice or recommendations for the agency. Here, Education advised us that the purpose of the four meetings was to "facilitate a conversation among groups . . . developing their own urban education initiatives," rather than to solicit advice regarding a departmental concern or initiative. While Education documents show that Education was working on an urban education initiative for the White House before these meetings were convened, neither the documentation we reviewed nor our interviews with participants show that Education had requested or solicited advice or recommendations on any specific issue or proposal before the department, which would be required to trigger FACA.[7] See Nader v. Baroody and other cases cited above.

As noted above, the group also communicated with the White House, both in a meeting attended by two White House officials and in the communiqué that the outside participants sent to the President. However, we did not find any indication that either of these communications was made in response to a "presidential request for specific recommendations on a particular matter of governmental policy." See Nader v. Baroody, discussed above. Consequently, the President's receipt of advice or recommendations that he did not solicit, and which were generated by the group on their own initiative, would not support the conclusion that the group thus became a Presidential advisory committee under FACA.

Applicability of Antilobbying Provisions

As part of our review, we investigated allegations that certain statements were made by Education officials at the Thursday meetings during fiscal year 1997 and that the statements violated statutory provisions prohibiting the use of appropriated funds by agency personnel for lobbying activities. We also examined several meetings, which occurred in fiscal years 1995

[7]With respect to Education's role in forming the group, Education advised us that one of its statutory purposes is to "supplement and complement the efforts of . . . the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education." 20 U.S.C. 3402(2).

and 1996, to determine whether any violations of antilobbying restrictions occurred during those meetings.

As explained below, the evidence we reviewed does not support a conclusion that Education officials violated antilobbying restrictions found in appropriations laws. In addition to the restrictions on lobbying contained in appropriations provisions, a criminal statute set forth at 18 U.S.C. 1913 provides that no appropriated funds may be used "directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation…." Since section 1913 is a criminal provision, its enforcement is the responsibility of the Department of Justice and the courts. The Department of Justice has interpreted section 1913 to prohibit "large-scale, high-expenditure campaigns specifically urging private recipients to contact members of Congress about pending legislative matters . . . ."[8] Furthermore, according to Education, the statute does not apply to public speeches, appearances, and writings, so that government employees are free to communicate with the public on agency and administration positions, even to the extent of calling on the public to contact Members of Congress in support of or in opposition to legislation.[9]

Since 18 U.S.C. 1913 is a criminal statute, the enforcement of which is a responsibility of the Department of Justice, we do not decide whether a given set of facts will constitute a violation of section 1913. Moreover, while in an appropriate case we could refer a possible violation of 18 U.S.C. 1913 to the Department of Justice for its consideration, there is no basis for referring this matter to the Department, since as explained hereafter, we did not find evidence that Education had violated the more broadly interpreted antilobbying restrictions in appropriations laws.

Applicable Legal Framework

Our analysis focuses on whether Education's actions were carried out in conformance with appropriations restrictions on the use of appropriated funds for lobbying purposes. Education was subject to two antilobbying appropriation provisions during fiscal year 1997. The first of these, found at section 503(a) of the 1997 Department of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act applied only

[8]Memorandum opinion for the Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, September 28,1989.

[9]See Barr Memorandum, September 28, 1989.

to those agencies receiving appropriations under that act. The second, found in section 631 of the 1997 Treasury, Postal Service, and General Government Appropriations Act, applied governmentwide. During fiscal years 1995 and 1996, Education was subject to an antilobbying provision contained in Education's appropriations acts, which was nearly identical to that found in its 1997 appropriations statute.[10]

With certain minor differences not pertinent here, the appropriations acts provide that no appropriated monies are to be used, "other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress . . . ."

Appropriations law provisions such as those applicable here prohibit "grass roots" lobbying, defined as an indirect attempt to influence pending legislation by urging members of the public to contact legislators to express support of, or opposition to, the legislation or to request them to vote in a particular manner.[11] The appropriations law provisions on lobbying have not been interpreted as providing an exception for public speeches, appearances, and writings, but do allow agencies to expend appropriated funds to communicate their views on pending legislation to the public or to meet with groups sharing their interest in legislation to exchange information and viewpoints.[12]

In a 1983 decision, we determined that some statements by an agency operating under a similar appropriation prohibition were permissible and some were not permissible. In that decision, we examined whether an article published in a magazine-type trade publication of the Department of Commerce had violated the applicable appropriation prohibition.[13] The article contained a discussion of various pending legislative proposals to amend the Export Administration Act of 1979. The article favored the administration's proposal but described other proposals as making radical changes and weakening existing controls. The article ended by stating that anyone who wishes to see the United States retain an effective but more efficient export control system "should certainly let his Congressman

[10]Section 504(a) of the 1995 and section 503(a) of the 1996 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts.

[11]Alleged Grass Roots Lobbying by CSA Recipient, B-202787, May 1, 1981, and cases cited therein.

[12]To the Honorable Jesse Helms, United States Senate, B-239856, April 29, 1991.

[13]To the Honorable Jake Garn, United States Senate, B-212235, November 17, 1983.

know that he supports the [Administration proposal]." We determined that the portions of the article where Commerce officials expressed their view on proposed legislation conformed to the law, but that the paragraph urging members of the public to urge their Congressmen to support legislation favored by the administration did not.

Analysis of Education Meetings

Thursday Meetings

In the Thursday meetings, one of the attendees alleged that Education officials were not simply providing information to the attendees but were also encouraging representatives of the attending organizations to lobby Congress and to contact their membership to, in turn, contact Congress with regard to certain legislative proposals. To support his allegations, this individual provided examples of statements made by Education officials, which he extracted from notes he took at the meetings.

In our view, most of the statements referred to were general requests for help or support in connection with spending initiatives the President wanted to include in the budget and certain tax deduction and credit proposals. The general statements requesting help or support do not contain the express request for participants to contact Congress or to encourage others to contact Congress, which is required to support a determination that the appropriations restriction on lobbying was violated. Furthermore, Education has stated that these statements were not intended to encourage participants to contact Congress or ask others to do so. We interviewed seven of the meeting attendees, none of whom felt that they were being encouraged to lobby Congress or ask others to do so.

Unlike the statements described above, two other statements provided by the same participant from his notes allegedly contained express appeals for participants to contact Congress either directly or through others. The participant alleged that "Someone then suggested that the Administration should tout the fact it favors $42 billion in increased federal education spending, instead of reiterating that the President's tax deduction and credit proposals amount to $35 billion. An Education official responded to this by noting that surveys had shown that 88 percent of Americans favor the credits and deductions and that it would be very helpful to get this message to those outside the Beltway so that pressure could be put on those inside the Beltway."

While Education admits that this statement would be "problematic" under the antilobbying prohibitions in applicable appropriations provisions, it reports that the official states that while she often uses the phrase "outside the Beltway" when discussing the need to disseminate information, she never stated that the reason to disseminate the information was to put pressure on those inside the Beltway.

In the second case, the participant alleged that "Discussion then turned to the higher education tax proposals. An Education official asked if the groups in attendance were sending letters to conferees on behalf of the Administration's higher education tax proposals. Only two people indicated their organizations were doing so. 'That's it? I guess that's the problem,' said the official. While she had earlier observed that those at the meeting were mostly a K-12 crowd, she asked if other groups could send such letters, 'like NEA for instance.'"

As in the first case, Education admits that, if made, the statement would be problematic under the antilobbying appropriations provisions. However, it states that the official did not ask participants to send letters to conferees. According to the official, she often encourages associations to send letters to the administration if they support the administration's position on a particular issue so that the Education can then publicly state that a particular policy or position is endorsed by that association.

Our interviews with other participants in the Thursday meetings support Education's responses to these allegations. None of the participants who were asked said that they ever got the sense that they were being requested to lobby Congress regarding pending legislation. One participant said that, although it was common for officials to ask for help, they never said what type of help they wanted. Another participant said that "Education [officials] would make their position known but there was always a disclaimer. Education would state how they felt but would say they could not tell anyone to lobby Congress." When asked about the two specific allegations we mentioned above, the participants either could not remember the statements at all or could not remember the exact wording of the statements. Accordingly, the evidence we reviewed does not support a conclusion that there was a violation of the antilobbying provisions.

Series of Outreach Meetings on the Budget

While reviewing electronic-mail and hard copy files at Education, we identified documents pertaining to a variety of meetings between Education officials and representatives of education interest groups. The documents revealed that Education has an extensive outreach program and a close working relationship with many educational interest groups

but did not, on their face, show any violations of the antilobbying laws. As agreed with your office, we examined the circumstances related to meetings referred to in two internal memorandums addressed to the Secretary to determine whether they involved prohibited grass roots lobbying.

The first memorandum was dated January 1995 and was related to the proposed cuts to the education budget via rescissions to appropriations. The memorandum stated that the rescissions bill could be an excellent opportunity to rally parents, students, and educators against the disinvesting in education. The memorandum further stated that the key was grass roots mobilization, which had already begun, and pointed out that the Committee for Education Funding (CEF) had formed a task force led by the National Education Association (NEA) to prepare material for distribution to their members regarding the rescissions. The second memorandum was also addressed to the Secretary to prepare him for a meeting with association presidents. The memorandum stated that the purposes of the meeting were to communicate the administration's goals, to get commitment from each association president to wage a 3-week all-out campaign with all resources available to them to raise the visibility of education and focus on regional/local media to effect negotiations, and to agree to keep in close contact.

We discovered that these memorandums related to a series of meetings concerning the Education's budget. Two of these meetings occurred on February 6, 1995, when the Secretary met with members of education groups and then with association presidents. He apparently met with the association presidents on February 27, 1995, and again on November 27, 1995.

These memorandums raise the issue of whether Education was improperly directing, participating in, or providing support for a grass roots lobbying effort. Agencies may not enlist lobbyists to mount a grass roots campaign and may not provide administrative support to lobbying groups either by assigning personnel to the groups or by preparing materials for them that are not otherwise available.[14] We also sought to determine whether the Secretary or any other Education official encouraged the meeting participants to contact Congress regarding the budget issues or asked the participants to conduct a grass roots campaign with their membership or

[14]Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft (GAO/AFMD-82-123), B-209049, Sept. 29, 1982, and Review of Aspects of the Maritime Administration's Relationship with the National Maritime Council (CED 8-497), B-192746-O.M., Mar. 7, 1979.

other members of the public. To examine these issues, we asked Education for its comments and for documents relating to the meetings, and we interviewed meeting participants. The evidence relating to these meetings does not indicate that Education was involved in providing the type of assistance to private lobbying groups that we have determined to be improper. Nor does it indicate that the Secretary or any other Education official was encouraging the participants of these meetings either to contact Congress or encourage members of the public to do so. Education informed us that the author of the first memorandum stated that she was simply informing the Secretary of the activities of various nonfederal entities that were forming task forces. She stated that the organizations mobilized themselves and that Education did not form any task forces.

We were able to obtain "talking points" that had been prepared for the Secretary's use at the February 6 meeting with members of education groups and at the February 27 meeting with association presidents. A note to the Secretary transmitting the February 6 talking points states that "The purpose of the meeting is to discuss common goals and strategies to protect the education budget and programs in the coming months. The meeting is not a briefing. The purpose of it is to enlist their support." Despite this characterization, there is nothing in the talking points that indicate that the Secretary asked for such assistance or suggested a joint plan of action. The talking points instead reveal a factual presentation of the budget proposals relating to education.

The talking points for the February 27 meeting indicate that the purpose was to discuss a rescission bill proposing cuts to the education budget. The talking points contain statements that might be interpreted as requesting assistance from association presidents in influencing Congress during its consideration of the rescission bill.[15] However, the copy of the talking points we reviewed had markings that, according to the Secretary, were made by him for use at the meetings. The Secretary stated that his regular practice is to review the points prepared by his staff and mark up those points that he intends to deliver. None of the statements that might be interpreted as requesting lobbying assistance had any markings by the Secretary. According to the Secretary, he has no specific memory of the meeting but believes it unlikely that he would have delivered any portion

[15] The talking points contained the following statements: "Polls show that an overwhelming majority of citizens favor increased investment in education. But polls are not enough. Members want to hear from back home and that is where your work is so important." "I do not believe that the results of the November election meant that the American people want to go backwards. There is nothing that tells me they want Congress to cut education. Its time to send that message." "In the weeks ahead, we will need to work together closely. I'd like to spend some time getting your thoughts on how we can best do that and what assistance you may need from us as you get information out to your constituencies."

of the points not marked up. We interviewed three participants in these meetings. None of them could remember the Secretary suggesting that the executives should "beat the bushes" for support of the administration's programs or join Education in any lobbying efforts. Consequently, there is no basis in the evidence we reviewed for us to conclude that the statements were made. Moreover, even if the statements in question were made, they are open to other interpretations. Since an agency has a legitimate interest in communicating with the public regarding its policies and activities, any discussion of those policies by agency officials is likely to refer to relevant pending legislation that might impact on such policies and activities and to indicate the agency's support for or opposition to the legislation. As a result, when we examine specific situations to determine if an agency has violated this type of appropriations restriction, we ordinarily defer to the agency's explanation of its actions if it appears reasonable under the circumstances. Accordingly, for these reasons we cannot conclude Education officials made statements in the series of outreach meetings we reviewed that violated the appropriations restrictions on lobbying.

Agency Comments and Our Evaluation

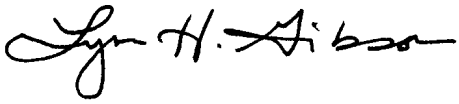
We provided Education a copy of our draft on its compliance with FACA and lobbying restrictions. On September 22, 1999, the Office of the General Counsel provided us written comments. It took no issue with the findings of our report.

As agreed with your office, unless you announce the contents of this report earlier, we plan no further distribution until 30 days after the date of this report. At that time, we will send copies of this report to the Honorable Richard W. Riley, Secretary of the Department of Education, and other interested parties. We will make copies of this report available to others on request.

Major contributors to this report are listed in appendix II. Please contact me at (202) 512-8676 or Lynn Gibson at (202) 512-5422 if you have any questions concerning this report.

Sincerely yours,

Michael Brostek
Associate Director, Federal Management
and Workforce Issues



Lynn H. Gibson
Associate General Counsel

Comments From the Department of Education

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

SEP 22 1999

Mr. Michael Brostek
Associate Director, Federal Management
and Workforce Issues
441 G Street NW
United States General Accounting Office
Washington, DC 20548

Re: Assignment Code 410201

Dear Mr. Brostek:

Secretary Riley forwarded the draft report entitled Department of Education: Compliance with Federal Advisory Committee Act and Lobbying Restrictions to me for review and comment. I understand that Joan Bardee of my staff has already provided technical comments on the report to your staff.

I am pleased that your office found the Department to be in compliance with both the Federal Advisory Committee Act and the various anti-lobbying restrictions applicable to the Department. While the Department's mission includes a mandate to provide information about education issues to the public, we are very careful to comply with both the letter and the spirit of these laws.

Thank you for the opportunity to comment.

Sincerely,

Judith A. Winston

600 INDEPENDENCE AVE., S.W. WASHINGTON, D.C. 20202-2100

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

GAO Contacts and Staff Acknowledgments

GAO Contacts

Michael Brostek (202) 512-8676

Lynn H. Gibson (202) 512-5422

Acknowledgments

In addition to the above named, Richard W. Caradine, Carolyn L. Samuels, Alan N. Belkin, Jessica A. Botsford, and Norman S. Einhorn made key contributions to this report.

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